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June 21, 2013

Submitted via FOIAonline

Larry Gottesman
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: **Freedom of Information Act Request - Stated Preference Survey for Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities (EPA-HQ-OW-2008-0667)**

Dear FOIA Officer Gottesman:

We are writing on behalf of Riverkeeper, Inc. and the Natural Resources Defense Council (collectively, Requesters) to request records in the possession of the U.S. Environmental Protection Agency (EPA) pursuant to the Freedom of Information Act (FOIA).¹ This request pertains to the Biological Evaluation (BE) that EPA sent to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively, the "Services") on or about June 18, 2013, pursuant to 50 C.F.R § 402.12, as described in a letter of that same date from Robert K. Wood, Director of EPA's Engineering and Analysis Division in the Office of Water to the Services, which initiated formal consultation under the Endangered Species Act (ESA).

As discussed below, Requesters request a fee waiver and expedited processing.

I.

RECORDS REQUESTED

We hereby request:

- (A) The aforementioned **Biological Evaluation (BE)** sent by EPA to the Services on or about June 18, 2013; and
- (B) The "**raw data files used to produce the BE**" referred to in the last paragraph of the second-to-last page of the aforementioned June 18, 2013, letter from Mr. Wood.

We request that all responsive information that exists in electronic form be provided in electronic

¹ 5 U.S.C. § 552.

form. We also request, to the extent they exist, the explanatory text, keys, guides, instructions, manuals for all codes and abbreviations used in raw data files, as needed to make them intelligible.

Please produce the records on a rolling basis; at no point should EPA's search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce.

II.

REQUEST FOR EXPEDITED PROCESSING

FOIA provides that each agency shall provide for expedited processing of records where there is a "compelling need."² EPA's FOIA regulations state that requests "will be taken out of order and given expedited treatment whenever EPA determines that such requests or appeals involve a compelling need" such as "[a]n urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public."³ In this case, employees of Requesters are persons primarily engaged in disseminating information to the public, and there is an urgent need to inform the public about the Survey conducted by EPA and the benefits of the cooling water intake structure regulation.

There is an urgent and compelling need for Requesters to have access to the requested records in time to provide information to the Services during ESA consultation. EPA initiated a formal consultation under the ESA with respect to its forthcoming regulations under Section 316(b) of the Clean Water Act on June 18, 2013. Requesters must be able to review the BE and related files in order to provide meaningful information to the Services regarding impacts caused to endangered species by facilities regulated under Section 316(b). If EPA does not expedite the processing of this request and disclose these records in an expedited fashion, it will have prevented the public from understanding and participating in the consultation process, by providing valuable information on endangered species to the Services.

III.

CLAIMS OF EXEMPTION FROM DISCLOSURE

If you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them anyway. As you know, on his first full day in office, President Obama declared a "New Era of Open Government" and issued a memorandum to the heads of all agencies directing that FOIA "should be administered with a clear presumption: In the face of

² 5 U.S.C. § 552(a)(6)(E)(i).

³ 40 C.F.R. § 2.104(e)(1)(i); *see also* 5 U.S.C. § 552(a)(6)(E)(v) (statutory definition of "compelling need").

doubt, openness prevails.”⁴ Agencies were directed to “adopt a presumption in favor of disclosure” and to apply that presumption “to all decisions involving FOIA.”⁵ Attorney General Holder’s FOIA Guidelines explain that the presumption of openness called for by the President means that information should not be withheld “simply because [an agency] may do so legally.” The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”⁶

Nevertheless, should you seek to withhold any records under FOIA’s narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*⁷ and related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

IV.

FEE WAIVER

Requesters request that EPA waive all fees associated with responding to this request. FOIA dictates that requested records be provided without charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”⁸ As explained below, the requested disclosure would meet both of these requirements because Requesters’ request complies with each of the factors agencies and courts consider in making fee waiver determinations.⁹ In addition, Requesters qualify as “representative[s] of the news media” entitled to a reduction of fees under the FOIA.¹⁰

A. Disclosure is in the Public Interest.

The disclosure requested here would be “likely to contribute significantly to public

⁴ President’s FOIA Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009. 74 Fed. Reg. at 4,683 (Jan. 26, 2009).

⁵ *Id.*

⁶ Attorney General’s FOIA Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009. Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁷ 484 F.2d 820 (D.C. Cir. 1973).

⁸ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1).

⁹ The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.,* Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *see also* *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii).

understanding of the operations or activities of the government.”¹¹ Specifically, as we discuss immediately below in subsections IV.A.1-4, the requested disclosure would satisfy the four elements identified in EPA’s FOIA Regulations¹² and in the U.S. Department of Justice’s Fee Waiver Policy Guidance.

1. The request concerns the operations or activities of the government.

The requested records concern “the operations or activities of the government.”¹³ EPA is responsible for developing a BE to initiate consultation under the ESA as well as promulgating regulations under Section 316(b). The BE plainly concern the operations or activities of government.

2. The disclosure is likely to contribute to an understanding of government operations and activities.

The requested records are “likely to contribute” to public understanding of the activities described above.¹⁴ The narrow request in this letter seeks materials which have not previously been made public. These materials will contribute meaningfully to public understanding of government activities, specifically EPA’s evaluation of the effects of EPA’s forthcoming rule on endangered species and critical habitats.

3. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Disclosure of these records will also “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”¹⁵ NRDC and Riverkeeper have a proven ability to digest and disseminate such information to the public quickly, through numerous and varied publications, educational programs, media initiatives, and public interest litigation. NRDC has already generated significant press coverage regarding the implementation and enforcement of the nation’s clean water laws. *See, e.g.*, Alison Kosik, “Experts: U.S. water infrastructure in trouble,” *CNN, International* (Jan. 21, 2011), available at <http://www.cnn.com/2011/US/01/20/water.main.infrastructure/index.html>; Gitte Laasby, “Is GSD turning lake into sewer?,” *Post-Tribune* (Jan. 31, 2011), available at <http://posttrib.suntimes.com/news/lake/3580708-418/overflows-gary-sewage-treatment-plant.html>; Bettina Boxall, “In a region that imports water, much goes to waste,” *Los Angeles Times* (Dec. 24, 2010), available at <http://www.latimes.com/news/local/la-me-water-storms-20101224,0,592116.story>; “Climate Change Worsens U.S. Beachwater Pollution,” *Environmental News Service* (July 29, 2009), available at <http://www.ens-newswire.com/ens/jul2009/2009-07-29-02.html>. Similarly, NRDC will disseminate summary

¹¹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹² *See* 40 C.F.R. § 2.107(l)(2).

¹³ 40 C.F.R. § 2.107(l)(2)(i).

¹⁴ 40 C.F.R. § 2.107(l)(2)(ii).

¹⁵ 40 C.F.R. § 2.107(l)(2)(iii).

and analysis of any newsworthy information conveyed in the requested records.

NRDC has the ability to disseminate information on water quality issues through its website (<http://www.nrdc.org>), which is updated daily and draws approximately 2.7 million page views and 800,000 visits per month; future issues of *OnEarth* magazine, which is distributed to approximately 150,000 subscribers, sold at newsstands and bookstores, and made available online free of charge at <http://www.nrdc.org/onearth>; its *Nature's Voice* newsletter on current environmental issues, distributed five times a year to NRDC's more than one million members and online activists and available online at <http://www.nrdc.org/naturesvoice/default.asp>, and other newsletters and alerts, including the following. NRDC's *Earth Action* email list has more than 145,000 subscribers who receive biweekly information on urgent environmental issues. Information disseminated to *Earth Action* email subscribers is also available online at NRDC's Action Center, <http://www.nrdc.org/action/default.asp>. *This Green Life* is NRDC's electronic newsletter on environmentally sustainable living. It is distributed by email to 63,000 subscribers (sample email at Attachment 6) and made available online at <http://www.nrdc.org/thisgreenlife/default.asp>. *NRDC Online* is a semimonthly electronic environmental newsletter distributed by e-mail to 35,000 subscribers, at <http://www.nrdc.org/newsletter>. NRDC also maintains a staff blogging site, "Switchboard," at <http://switchboard.nrdc.org>, which is updated daily and features more than 100 bloggers writing about current environmental issues. The blogs draw approximately 75,000 page views and 45,000 visits per month; Switchboard's RSS feeds have approximately 2,500 subscribers; and Switchboard posts appear on websites of other major internet media outlets, such as "The Huffington Post," at <http://www.huffingtonpost.com>. NRDC's profiles on "Facebook," at <http://www.facebook.com/nrdc.org>, and "Twitter," at <http://www.twitter.com/nrdc>, are updated daily and have approximately 140,000 fans and 6,700 followers, respectively.

NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has nearly thirty staff members dedicated to communications work, *see* "Communications" staff list at <http://www.nrdc.org/about/staff.asp>. NRDC employees provide Congressional testimony; appear on television, radio and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. *See, e.g.*, Testimony of David Doniger, NRDC Climate Center Policy Director, before United States House Subcommittee on Energy and Environment, Apr. 24, 2009; Transcript, "Pollution Still a Hazard to U.S. Beaches," CBS, *CBS NEWS*, July 29, 2009 (featuring NRDC Water Program Co-Director Nancy Stoner); Transcript, "Companies Quit U.S. Chamber Over Climate Policy," National Public Radio, Oct. 6, 2009 (featuring NRDC Climate Campaign Director Pete Altman); Conference brochure, "World Business Summit on Climate Change," May 24-26, 2009 (featuring NRDC Director for Market Innovation Rick Duke at 9); Article, "For climate pact, a step back is sold as first step," *Chicago Tribune*, Nov. 22, 2009 (featuring NRDC International Climate Policy Director Jake Schmidt); Article, "Court Showdown Looms for NYC Electronics Recycling Law," *New York Times*, Jan. 5, 2010 (featuring NRDC Attorney Kate Sinding); Article, "Environmental groups try to block parts of California's green building code," *Los Angeles Times*, Jan. 11, 2010); Article, "An Inconceivable Truth," *Vogue*, Aug. 2007 (featuring NRDC Public Health Scientist Sarah Janssen); Article, "Green State of the Union," *Deliver Magazine*, Sept. 2009 (written by NRDC communications

staff member Francesca Koe); Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall); Research article, "Outcomes of the California Ban on Pharmaceutical Lindane: Clinical and Ecological Impacts," *Environmental Health Perspectives*, March 2008 (co-authored by NRDC Public Health Scientist Sarah Janssen and NRDC Public Health Senior Scientist Gina Solomon); Publisher's notes to *Clean Energy Common Sense: An American Call to Action on Global Climate Change* (Rowman & Littlefield Publishers, Inc. 2009), by NRDC President Frances Beinecke); and NRDC: Publications in Print, <http://www.nrdc.org/publications>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below.

- a. In October 2008, NRDC issued a report assessing the degree of enforcement of California's environmental and public health laws. This report, *An Uneven Shield: The Record of Enforcement and Violations Under California's Environmental, Health, and Workplace Safety Laws*, examined data on known violations and law enforcement responses under six critical pollution, health, and workplace safety programs. Much of the data analyzed in the study was obtained through formal FOIA requests. *See id.* at pp. 4, 16.
- b. NRDC obtained, through a court-enforced FOIA request, records of the operations of the Bush administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22; Bennett Roth, "Houston Energy-Drilling Firm Appears in Documents from Energy Department," *Houston Chronicle*, Apr. 12, 2002.
- c. NRDC obtained, through a FOIA request, a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush administration to replace Dr. Watson. *See* NRDC Press Release and accompanying Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.
- d. NRDC incorporated information obtained through FOIA into a 2005 report,

published and provided free of charge at NRDC's website, *see* <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Attachment 34). Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007.

- e. NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.
- f. NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See* <http://www.nrdc.org/health/pesticides/natrazine.asp>; *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?," *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- g. NRDC has obtained, through FOIA, information on the levels of arsenic in drinking water supplies across the country. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through NRDC's website, *see* <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>, and provided analysis describing its significance and guiding interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.* (Attachment 39); *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).
- h. In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. *See* NRDC, *Spills & Kills*, Aug. 2000.
- i. In 1999, NRDC obtained, through FOIA, a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. The document attracted significant press attention once it was disclosed. *See, e.g.*, Walter Pincus, "Study Says U.S. Secretly Placed Bombs; Cold War Deployments Affected Mostly Allies," *Washington Post* (Oct. 20, 1999) at A3. One of NRDC's nuclear scientists, Robert Norris, published a

detailed analysis of this document explaining its significance to the public. *See* Robert S. Norris, William M. Arkin, and William Burr, "Where They Were," *Bulletin of Atomic Scientists*, Nov./Dec. 1999.

- j. In 1996, NRDC obtained, through FOIA, test results regarding lead levels in the District of Columbia's drinking water supplies. NRDC made the test results public along with analysis explaining the significance of the results. *See* D'Vera Cohn, "Tap Water Safeguards Still Stalled; City Failed to Tell Some Residents of Excess Lead Contamination," *Washington Post*, Apr. 18, 1996, at J1.
- k. In 1989, NRDC obtained, through FOIA, testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. *See* Larry Liebert, "Oil Testimony Reportedly Quashed; Environmentalists say Federal Experts Pressured by Bush," *Orange County Register*, Oct. 5, 1989, at A6.
- l. In 1988, NRDC obtained, through FOIA, a report by the U.S. Fish and Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Reagan administration officials had tried to keep the report secret and then repudiated it upon its release. *See* Eric Lichtblau, "Federal Report Blasts Offshore Oil Studies," *L.A. Times*, June 4, 1988, at A32.
- m. In 1982, NRDC obtained, through a FOIA request, an EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. *See* Sandra Sugawara, "Lead in Air is Undermeasured, EPA Section Chief's Memo Says," *Washington Post*, July 11, 1982, at A6.

Likewise, Riverkeeper also has a proven ability to digest and disseminate such information to the public quickly, through numerous and varied publications, educational programs, media initiatives, and public interest litigation. Riverkeeper has already generated significant press coverage regarding cooling water intake structures. Riverkeeper disseminates information on water quality issues through its website (<http://www.Riverkeeper.org>), which is updated daily and draws approximately 80,000 page views and 20,000 visits per month; Riverkeeper also has a substantial Member Alert program which includes monthly e-newsletters, action alerts and event announcements and updates. Riverkeeper's e-alert email list has more than 15,000 subscribers who receive information on urgent environmental issues. *The Riverkeeper Journal* is Riverkeeper's annual journal, receiving over 5,000 original impressions (hard copy) and is made available in both hard copy and online at <http://www.riverkeeper.org/about-us/publications/the-journal/>. Riverkeeper also maintains a staff blog which features additional bloggers writing about power plant intake structures with a particular emphasis on EPA's national regulation. Additionally, Riverkeeper's various online profiles on "Twitter," "Facebook," "MySpace," "Youtube," and "Flickr," allow members and interested groups to stay current on Riverkeeper

events, videos and news. Riverkeeper also routinely uses FOIA to obtain information from federal agencies that Riverkeeper's legal and scientific experts and partners analyze in order to inform the public about a variety of issues relation to keeping the nation's waters fishable, drinkable, and swimmable. Riverkeeper specifically makes information about cooling water intake structures available on its website at www.riverkeeper.org and at www.powerplantsthatsuck.org, which is dedicated to cooling water intake structure issues.

As these examples demonstrate, Requesters have a proven ability to digest and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to understanding of a reasonably broad audience of persons interested in the subject.

4. The information will contribute “significantly” to public understanding of government operations or activities.

Disclosure of the requested documents is “likely to contribute significantly to public understanding,”¹⁶ because Requesters intend to disseminate any newsworthy information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. As NRDC's and Riverkeeper's long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, Requesters are well prepared to convey to the public any relevant information it obtains through this records request.¹⁷

None of the materials requested have been made public at all, yet they are essential to evaluating EPA's Section 316(b) rulemaking and the effects of cooling water intake structures at existing facilities on endangered species. As discussed above, these materials will allow the public and independent experts to critically evaluate these issues to provide meaningfully information to the Services.

Therefore, the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.¹⁸

B. Requesters have no commercial interest in this information.

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Requesters do not have any commercial interest that would be furthered by the requested

¹⁶ 5 U.S.C. § 552(a)(4)(iii); 40 C.F.R. § 2.107(l)(2)(iv).

¹⁷ For example, information NRDC obtained through FOIA requests resulted in the following articles, in addition to those referenced above: Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *New York Times* (Jan. 11, 2005); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *New York Times* (Aug. 22, 2003); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *New York Times* (Apr. 27, 2002).

¹⁸ 40 C.F.R. § 2.107(l)(2)(iv).

disclosure.¹⁹ NRDC and Riverkeeper are not-for-profit organizations and, as such, have no commercial interest.²⁰ “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”²¹ Requesters’ interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about EPA’s implementation of Section 316(b) of the CWA and the effect on endangered species.

For all of the foregoing reasons, a fee waiver is warranted here.

C. Requesters are media requesters

Even if EPA were to deny a public interest waiver of all costs and fees, Requesters are representatives of the news media entitled to a reduction of fees under FOIA and EPA’s FOIA regulations.²² Under FOIA, a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”²³

As described earlier in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has approximately 150,000 subscribers and is available at newsstands and bookstores; publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. Finally, as described above, NRDC maintains a significant additional communications presence on the internet through staff blogs and secondary coverage of NRDC communications on websites not affiliated with NRDC.²⁴ NRDC has previously been categorized as a “news media” requester under FOIA.²⁵

As also described above, Riverkeeper publishes an annual magazine, *The Riverkeeper Journal*, which has approximately 3,000 subscribers; publishes a regular newsletter for its more than 4,500 members and more than 15,000 online activists; issues other electronic newsletters, action

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

²⁰ 40 C.F.R. § 2.107(l)(3)(i).

²¹ *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); see also *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

²² 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii), (l).

²³ 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. United States Dep’t of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

²⁴ See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”).

²⁵ Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status, and also granting a full fee waiver).

alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public. Riverkeeper staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. Finally, as described above, Riverkeeper maintains a significant additional communications presence on the internet through staff blogs and secondary coverage of Riverkeeper communications on websites not affiliated with Riverkeeper. Thus, Riverkeeper is also a media requester.

As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of Requesters' publications or other suitable media channels.

V.

WILLINGNESS TO PAY FEES UNDER PROTEST

Please provide the records above irrespective of the status and outcome of your evaluation of Requesters' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, Requesters state that they will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations.²⁶ Please consult with us, however, before undertaking any action that would cause the fee to exceed \$100. Such payment will not constitute any waiver of Requesters' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

VI.

CONCLUSION

Please produce the records above by emailing them to reed@superlawgroup.com (email is preferred) or mailing them to me at the address listed on the first page of this letter. As noted, above, we request electronic copies of documents that are stored in electronic form. Alternatively, you may add them to EPA's CWA section 316(b) rulemaking docket (Docket ID No. EPA-HQ-OW-2008-0667) and alert me as to which documents have been added.

Thank you for your attention to this matter. If there is anything we can do to facilitate this request or if you have any questions, please contact us.

Very truly yours,



Reed W. Super

²⁶ 40 C.F.R. § 2.107(c)(1)(iv), (c)(2), and (d).